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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-99

CHIEF HARRY PARKER,
Petitioner,

vs.

JAMES RANDOLPH, WILBURN LEE PICKENS, and
ISAIAH HAMILTON,
Respondents.

BRIEF FOR PETITIONER

ROBERT E. KENDRICK
Deputy Attorney General

MICHAEL E. TERRY
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
Phone (615) 741-2640

Of Counsel

WILLIAM M. LEECH, JR.
Attorney General
State of Tennessee



TABLE OF CONTENTS

	Page
Opinions Below	1
Grounds on Which Jurisdiction Is Invoked	2
Constitutional Provision Involved	2
Question Presented	3
Statement of the Case	3
Argument	8
Contrary to the Decision of the Sixth Circuit the Con- frontation Clause of the Sixth Amendment and the Decisions of This Court Do Not Require the Writ of Habeas Corpus to Issue	8
Conclusion	25

Table of Authorities

Cases:

Barber v. Page, 390 U.S. 719 (1968)	10
Blumenthal v. United States, 332 U.S. 539 (1947)	11
Bruton v. United States, 391 U.S. 123 (1968)	3, 5, 6, 8, 11, 12, 16, 19, 22, 23
Bunton v. Commonwealth, 464 S.W.2d 810 (Ky. 1971) ..	20
Catanzaro v. Mancusi, 404 F.2d 296 (1968), cert. denied, 397 U.S. 942 (1970)	20, 21, 22, 23
California v. Green, 399 U.S. 149, 175 (1970)	9, 10
Connecticut v. Oliver, 273 Atl.2d 867 (1970)	20

Delli Poali v. United States, 352 U.S. 233 (1957)	11
Doddell v. United States, 221 U.S. 325, 330 (1911)	10
Dutton v. Evans, 400 U.S. 74, 94 (1970)	10
Ferguson v. Georgia, 365 U.S. 570 (1961)	9
Frazier v. Cupp, 394 U.S. 731 (1969)	24
Hall v. Wolff, 539 F.2d 1146 (8th Cir. 1976)	23
Harrington v. California, 395 U.S. 250 (1969)	3, 8, 12, 13, 14, 15, 16, 17, 18, 22, 23
Jones v. Florida, 227 So.2d 326 (Fla. App. 1969)	20
Krulewitch v. United States, 336 U.S. 440 (1949)	10
Lutwak v. United States, 336 U.S. 440 (1949)	25
Lutwak v. United States, 344 U.S. 604 (1953)	10
Mack v. Maggio, 538 F.2d 1229 (5th Cir. 1976)	23
Mancusi v. Stubbs, 408 U.S. 204 (1972)	10
Mattox v. United States, 146 U.S. 140, 151 (1892)	10
Mattox v. United States, 156 U.S. 237, 246-249 (1958) ..	10
McHenry v. United States, 420 F.2d 927 (10th Cir. 1970)	20
Metropolis v. Turner, 437 F.2d 207 (10th Cir. 1971)	22
Miranda v. Arizona, 384 U.S. 436 (1966)	7
Motes v. United States, 178 U.S. 458 (1899)	12
Oneil v. State, 455 S.W.2d 597 (Tenn. 1970)	20
Ortez v. Fritz, 476 F.2d 37 (2nd Cir. 1973)	20
People v. Moll, 256 N.E.2d 185 (N.Y. 1970) cert. denied, 90 S. Ct. 1707 (1970)	20
People v. Rayes, 266 N.E.2d 539 (Ill. App. 1970)	20
People v. Rosochacki, 244 N.E.2d 136 (Ill. 1969)	20
Pointer v. Texas, 380 U.S. 400 (1965)	11

Randolph, et al. v. Parker, 575 F.2d 1178 (6th Cir. 1978)	1, 19, 20
Roberts v. Russell, 392 U.S. 293 (1968)	12
Schneble v. Florida, 405 U.S. 427 (1972)	3, 8, 14, 15, 16, 17, 18
Snyder v. Massachusetts, 291 U.S. 97, 122 (1934)	25
State v. Anderson, 229 So.2d 329 (1969), rev'd on other grounds, 403 U.S. 949	20
State v. Brinson, 177 S.E.2d 393 (N.C. 1970)	20
State v. Hall, 178 N.W.2d 268 (Neb. 1970)	20
Stewart v. Arkansas, 519 S.W.2d 733 (1975)	20
United States ex rel. Duff v. Zelker, 452 F.2d 1009 (2nd Cir. 1971)	21
United States ex rel. Dukes v. Wallack, 414 F.2d 246 (2nd Cir. 1969)	20
United States, ex rel. Long v. Pate, 418 F.2d 1028 (7th Cir. 1969)	22
United States v. Digilio, 538 F.2d 972 (3rd Cir. 1976) ..	23
United States v. Spinks, 470 F.2d 64 (7th Cir. 1972), cert. denied, 409 U.S. 1011 (1972)	22
United States v. Venere, 416 F.2d 144 (5th Cir. 1969) ..	20
United States v. Walton, 538 F.2d 1348 (8th Cir. 1976) ..	23
West v. Louisiana, 194 U.S. 258, 265, 266 (1904)	10
Statutes:	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2254(d)	7

Misc.:

H. Steven, "The Trial of Sir Walter Raleigh", Transactions of the Royal Historical Society, 172, 184, (4th Series, Vol. II, 1919)	9
Note 44, St. John's Law Review 54, 64 (1969)	10
Sixth Amendment to the Constitution of the United States	2
5 Wigmore, Evidence § 1397 at 130-131	9

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BRIEF FOR PETITIONER

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Sixth Circuit was rendered on May 19, 1978, and is reported as *Randolph, et al. v. Parker*, 575 F. 2d 1178 (6th Cir. 1978).

This case arose as separate petitions for federal habeas corpus relief which were consolidated in the United States District Court for the Western District of Tennessee, Western Division. At the district level, these cases were styled *James Randolph v. Chief Harry Parker*, Civil C-76-68; *Wilburn Pickens v. Chief Harry Parker*, Civil C-76-69; and *Isaiah Hamilton v. Chief*

Harry Parker, Civil C-76-310. On May 2, 1977 Chief Judge Bailey Brown entered a Memorandum Decision which is not reported but is contained within the appendix at pages 321-326.

The opinion of the Supreme Court of Tennessee, reversing the Tennessee Court of Criminal Appeals, and affirming the convictions of the respondents, was filed on December 15, 1975 and is contained within the appendix at pages 227-246. The opinion of the Tennessee Court of Criminal Appeals, reversing the convictions of the respondents, was filed on June 5, 1974 and is contained within the appendix at pages 215-226. Neither of these opinions is reported.

GROUND ON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit was rendered on May 19, 1978. The state did not file a petition to rehear. A petition for the writ of certiorari was timely filed with this Court and granted on November 27, 1978. The writ of certiorari was limited to question one presented by the petition. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit has correctly interpreted the law as stated by this Court in *Bruton v. United States*, 391 U.S. 123 (1968); *Schneble v. Florida*, 405 U.S. 427 (1972); and *Harrington v. California*, 395 U.S. 250 (1969).

STATEMENT OF THIS CASE

The question before this Court may be characterized as a question of law. However, this question must also be decided with reference to the facts in this particular case. Therefore, the following summary of the facts is submitted so that this Court may be well acquainted with the factual basis upon which the three respondents were convicted in state court. Other summaries of the facts appear in the opinion of the Court of Criminal Appeals (Appendix pp. 216-218), the opinion of the Supreme Court of Tennessee (Appendix pp. 228-234), the magistrate's preliminary report (Appendix pp. 280-282), the district court's memorandum decision (Appendix pp. 321-322), and the memorandum decision of the United States Court of Appeals for the Sixth Circuit which is reported at 575 F.2d 1178 (6th Cir. 1978).

The three respondents were convicted for their participation in the murder and robbery of William Douglas, in Memphis, on July 6, 1970. Mr. Douglas was a professional gambler who had, for some time prior to his murder, been winning money from Robert Wood, one of the respondents' co-defendants in state court. Mr. Douglas, by using marked playing cards, had cheated

Robert Wood out of approximately \$5,000 in three poker games set up between the two, spanning the three weeks prior to the Douglas murder.

Robert Wood suspected that he was being cheated and enlisted his brother, Joe Wood, also a co-defendant at the trial, in a scheme to recoup his losses. The scheme was for Robert to set up a game with Douglas, and for his brother and the three respondents to rob the game, and thus recoup some of Robert's losses. Prior to the night of the murder, Joe took two of the respondents, Hamilton and Pickens, to the scene of the game, pointed out to them the particular apartment where the game would be played, promised them \$3,000 to \$4,000 to rob the game, and also told them that he would be inside the game and would kill Douglas, if he had to. James Randolph was enlisted by Joe Wood to participate in the scheme on the night of the murder, July 6, 1970.

On that night, Robert Wood and William Douglas began playing poker at approximately 7:30 p.m. Joe Wood and one Tommy Thomas sat in the same room as spectators. Sometime before 9:00 p.m., Joe Wood announced he was going to get some beer. While allegedly obtaining beer, Joe Wood met with the three respondents. After a brief meeting, a trip to a nearby restaurant, the purchase of some beer, and the positioning of their automobiles, the four men approached the apartment. Those inside heard people approaching and Douglas, fearing a break-in, armed himself with a shotgun. Joe Wood convinced Douglas he was alone, and his three companions returned to their automobiles. Douglas made Joe Wood crawl through a small window next to the door. Once Joe Wood was back in the room, Douglas resumed the poker game. The game was resumed for some five to ten minutes when Joe Wood arose and asked permission to go to the bathroom. He came out of the bathroom armed with a gun and walked behind Douglas, ordering Douglas and Thomas to lie on the floor.

Joe Wood then handed the gun to his brother Robert, and ran out the door, leaving it open. Thomas, in an effort to avoid the shooting, arose from the floor, closed the door and attempted to talk to Robert Wood. Douglas then made a move for the pistol in his belt and Robert Wood killed him. Within seconds, the three respondents kicked in the door and one of the three fired a shot at Robert Wood. The record shows that Joe Wood had summoned them when he ran from the apartment. One of the respondents searched Thomas and took from him a knife and \$80.00. Robert Wood took all the money on the table and stuffed it in his pockets. Everyone then left with the exception of Thomas, who remained behind with Douglas. The three respondents and the two Wood brothers, riding in two automobiles, went to the apartment of Hamilton where they hid the weapons and split the money.¹

Subsequent to this incident all five co-defendants were either arrested or surrendered themselves to the Memphis police. Statements were made by all defendants except Joe Wood. At trial, only Robert Wood testified. The statements of Hamilton, Pickens, Randolph, and Robert Wood, all found by the trial judge to have been given freely and voluntarily, were admitted into evidence through the testimony of several police officers of the Memphis Police Department. In an effort to comply with *Bruton*,² the trial court and all counsel diligently attempted a program of redaction and deletion for each of these statements.

¹ The statement of the case in the Petition for Writ of Certiorari contained a somewhat different interpretation of the facts. In the petition, the conclusion reached is that Pickens did not go to Hamilton's apartment after the crime, nor did he receive any money. A closer examination of the trial records makes this interpretation erroneous. Only Pickens' own self-serving statements would support this conclusion. The statements of his co-defendants, including the testifying Robert Wood, support the conclusion that Pickens went to Hamilton's apartment and did receive his share of the money. (See Appendix, pp. 136, 143).

² 391 U.S. 123 (1968).

The original signed statements and a police record of an oral statement made by Hamilton were made part of the trial record but not viewed by the jury. Substantial and material other evidence was admitted showing the guilt of each of the defendants. This other evidence is more fully described and discussed within the argument portion of this brief.

On July 25, 1972, the two Wood brothers and the three respondents were found guilty of murder in the perpetration of a robbery in the Criminal Court of Shelby County (Memphis), Tennessee. Punishment for each was set at life in the state penitentiary. These convictions were appealed to the Court of Criminal Appeals of Tennessee and, on June 5, 1974, the Court of Criminal Appeals rendered a divided decision reversing the convictions of all five defendants. (Appendix, p. 215). Although the Court of Criminal Appeals found *Bruton* type error, the decision is primarily based upon an interpretation of the felony murder rule. The state petitioned the Supreme Court of Tennessee and certiorari was granted. On December 15, 1975, the Supreme Court of Tennessee rendered a per curiam opinion reversing the Court of Criminal Appeals and affirming the convictions. (Appendix, p. 227).

In February of 1976 Wilbur Pickens and James Randolph sought resort to the federal courts by filing petitions for the writ of habeas corpus. (Appendix, p. 247). On March 17, 1976 the State responded to the cases of Pickens and Randolph. (Appendix, p. 259). Subsequently, Isaiah Hamilton petitioned for the writ of habeas corpus and his case was consolidated with that of the other two respondents. (Appendix, pp. 264, 296). The cases were referred to a magistrate for report. (Appendix, p. 264). After several responses by the State and several references to the magistrate, an evidentiary hearing was set by Chief Judge Brown and held in Memphis on April 29, 1977. Although argument was held on the *Bruton* issue the primary thrust of the evidentiary portion of this hearing concerned an

alleged *Miranda*³ violation which only related to Pickens. On May 2, 1977 Chief Judge Brown rendered a memorandum decision concluding that the admission into evidence of Pickens' confession was constitutional error in that it violated his rights as set out in the *Miranda* case. Judge Brown also found that the rights of all three petitioners, pursuant to the *Bruton* doctrine, were violated and that he was unable to conclude that this violation was harmless error. (Appendix, p. 321). A judgment was entered in accordance with the memorandum decision and the State was ordered to discharge the petitioners from custody unless they were retried within a reasonable time, or a timely appeal was taken.

The State of Tennessee timely appealed the case to the United States Court of Appeals for the Sixth Circuit, sitting in Cincinnati, Ohio. On May 19, 1978 the Court of Appeals rendered a decision affirming the district court. No petition to rehear was filed since the decision of the Court of Appeals addressed all issues in question. The State of Tennessee then sought a writ of certiorari from this Court presenting two questions, the one here briefed and a second question concerning the district court's re-weighing of evidence on the *Miranda* issue as it related to 28 U.S.C. § 2254(d). On November 27, 1978 this Court issued the writ of certiorari limited to question one, which is here briefed.

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

ARGUMENT

Contrary to the Decision of the Sixth Circuit the Confrontation Clause of the Sixth Amendment and the Decisions of This Court Do Not Require the Writ of Habeas Corpus to Issue.

The United States Court of Appeals for the Sixth Circuit has voided three first degree murder convictions, obtained almost seven years ago. The State of Tennessee is very much aggrieved by the decision of the Sixth Circuit and submits this decision is based on a misinterpretation of certain decisions of this Court and is inconsistent with decisions rendered in other circuits and various state courts.

The Sixth Circuit's decision is based primarily upon a finding that the respondents' constitutional rights, as enunciated by this Court in *Bruton v. United States*, 391 U.S. 123 (1968), were violated. The petitioner has maintained throughout the federal proceedings that the doctrine of *Bruton* is inappropriately applied to this case. The case sub judice is much more analogous to the factual situations before this Court in *Schneble v. Florida*, 405 U.S. 427 (1972), and *Harrington v. California*, 395 U.S. 296 (1969). The case before this Court should not be labeled a *Bruton* case. The case before this Court is a right to confrontation case, if it must be labeled at all. The decision of the Sixth Circuit results from a misinterpretation of this Court's decisions in *Bruton*, *Schneble*, and *Harrington*; and the prevailing law regarding the Confrontation Clause of the Sixth Amendment.

The Confrontation Clause of the Sixth Amendment guarantees the right to confrontation for the beneficiaries of the American Constitution. The Clause itself is immutable and, of course, is an Eighteenth Century articulation of the right. The right, however, is evolutionary in nature. This characteristic has caused some confusion among men searching for the origin of

the Clause. This characteristic also causes confusion when men search for the meaning of the right.⁴

As to the origin of the Clause, one popular notion is the Clause is an indirect result of the trial of Sir Walter Raleigh in 1603 which focused attention on certain abusive trial practices. Sir Walter's conviction for treason to a great extent rested upon a statement made by one Cobham, who implicated Raleigh in a plot to seize the throne. Sir Walter, according to the story, had a retraction and attempted to call Cobham as his witness but failed.⁵

Professor Wigmore explains the Confrontation Clause as a constitutionalization of the hearsay rule and all its exceptions.⁶ Perhaps a better view is that the Clause originated simply as part of the overall effort of the Framers to constitutionally assure that a fair defense could be made to criminal accusation.⁷ Mr. Justice Harlan, after examining the original of the Clause

⁴ The interpretative extremes to which the Clause is susceptible was most succinctly stated by Mr. Justice Harlan in *California v. Green*, 399 U.S. 149, 175 (1970): "Simply as a matter of English the Clause may be read to confer nothing more than a right to meet face to face all those who appear and give evidence at trial. Since, however, an extrajudicial declarant is no less a witness, the Clause is equally susceptible of being interpreted as a blanket prohibition on the use of any hearsay testimony".

⁵ See *California v. Green*, 399 U.S. 149, 158, 177-179 (1970) (Harlan, J., concurring), citing F. Heller, *The Sixth Amendment*, 104 (1951) and H. Steven, "The Trial of Sir Walter Raleigh", *Transactions of the Royal Historical Society*, 172, 184, (4th Series, Vol. II, 1919).

⁶ See *California v. Green*, *supra* at 399 U.S. 178 at 179, citing 5 Wigmore, *Evidence* § 1397 at 130-131.

⁷ Sir Walter Raleigh's inability to call or cross-examine Cobham was not the only problem he experienced in attempting to defend himself. As indicated above, a defendant at that time could not call witnesses in his own behalf, could not testify in his own behalf, had no right to counsel, and basically was confined to simply arguing that the prosecution had not proved its case. See *California v. Green*, *supra* at 177. See also *Ferguson v. Georgia*, 365 U.S. 570 (1961).

and the historical context of its passage, seems to adopt this view, and as to meaning states: "From the scant information available it may tentatively be concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses."⁸ Thus, the Confrontation Clause, as written in the Sixth Amendment, demonstrates an evolution in the law from 1603 until the time our Constitution was adopted. Although the writing has not changed, the evolution continues.

There can be little doubt that in the beginning "the paradigmatic evil the Confrontation Clause was aimed at (was) trial by affidavit."⁹ Early decisions considering the right to confrontation all involve ex parte testimony and turn on the issue of availability and the hearsay rule.¹⁰ Thus, for many years, the right to confrontation and the right to cross-examination developed as identical concepts. Accordingly, exceptions to the hearsay rule, which qualify the right to cross-examination, were regarded as compatible with the right to confrontation.¹¹ Furthermore, in joint trials where two or more defendants were tried for the same offense, a declaration made by one which incriminated both was admitted in evidence, without the mak-

⁸ *California v. Green*, *supra* at 180.

⁹ *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring).

¹⁰ See *West v. Louisiana*, 194 U.S. 258, 265, 266 (1904); See also *California v. Green*, *supra*, 179-188; and cases cited within footnote 11 of this text. Of course, availability is still an important factor. Compare *Mancusi v. Stubbs*, 408 U.S. 204 (1972) and *Barber v. Page*, 390 U.S. 719 (1968); and so is the hearsay rule. See *Dutton v. Evans*, 400 U.S. 74 (1970); *Lutwak v. United States*, 344 U.S. 604 (1953); and *Krulewitch v. United States*, 336 U.S. 440 (1949).

¹¹ See *Doddell v. United States*, 221 U.S. 325, 330 (1911) (official documents); *Mattox v. United States*, 156 U.S. 237, 246-249 (1958) (witness dead); *Mattox v. United States*, 146 U.S. 140, 151 (1892) (dying declarations); See also Note 44, *St. John's Law Review* 54, 64 (1969).

er's testimony, provided the court by proper instructions limited the application and told the jury that the statement could be considered only against the declarant. *Blumenthal v. United States*, 332 U.S. 539 (1947); *Delli Paoli v. United States*, 352 U.S. 233 (1957). Of course, the non-testifying co-defendant's extrajudicial statement constituted inadmissible hearsay as to the incriminated non-confessor. Nevertheless, even though the hearsay rule was violated, the Confrontation Clause was satisfied. However, the decisions of this Court since *Delli Paoli* clearly demonstrate that the right to confrontation is something other than a constitutionalization of the hearsay rules.¹²

In 1968 this Court overruled *Delli Paoli* with the decision of *Bruton v. United States*, 391 U.S. 123 (1968). In *Bruton*, Bruton and one Evans were jointly tried and convicted of armed postal robbery. Neither testified upon their trial. Bruton made no admissions or confessions. However, Evans did confess to the postal authorities that he and Bruton committed the robbery in question and upon trial Evans' confession, including the portion which implicated Bruton, was received into evidence. In fact, the most damning evidence against Bruton was Evans' confession. This Court reversed Bruton's conviction and held that his rights under the Confrontation Clause had been violated because there was a substantial risk that the jury, despite instructions to the contrary, had looked to the incriminating statements made by Bruton's co-defendant. Three weeks later this Court

¹² For example, in *Pointer v. Texas*, 380 U.S. 400 (1965), the prior testimony exception to the hearsay rule permitted the introduction at trial of the transcript of a preliminary hearing. This Court reversed the convictions and held the defendants were denied their confrontation rights, despite the hearsay exception. Similarly, in *Barber v. Page*, *supra*, the prior testimony exception was used to again allow a preliminary hearing transcript. This court reversed and held that the right to confrontation had been violated by the failure of the state to make a good faith effort to secure the presence of the witness at trial. On the other hand, see *Dutton v. Evans*, *supra*, n. 10; *Lutwak v. United States*, *supra*, n. 10; *Krulewitch v. United States*, *supra*, n. 10, and *Mancusi v. Stubbs*, *supra*, n. 10.

held *Bruton* was retroactive and applied to the states. *Roberts v. Russell*, 392 U.S. 293 (1968).

The next year this Court decided the case of *Harrington v. California*, 395 U.S. 250 (1969). In *Harrington*, this Court with Mr. Justice Douglas writing, held that a *Bruton* type violation can constitute harmless error.¹³ In *Harrington*, four men were tried together—Harrington, a caucasian, and Bosby, Rhone, and Cooper, who were black. All four were found to have participated in an attempted robbery in the course of which a store employee was killed. Each of Harrington's co-defendants confessed and their confessions were introduced at the trial with limiting instructions that the jury was to consider each confession only against the confessor. Rhone testified, and Harrington's counsel cross-examined him. The other two individuals, Bosby and Cooper, did not take the stand. These facts are analogous to the case sub judice. Here, three black men and two white men have been convicted of murder in the perpetration of a robbery. Four of the individuals tried in state court made statements which were admitted at trial.¹⁴ One of the

¹³ The harmless error concept was no stranger to the Confrontation Clause. See *Motes v. United States*, 178 U.S. 458 (1899).

¹⁴ (a). Joe Wood did not make a statement. (b). Robert Wood made a detailed lengthy statement which was recorded, transcribed, and signed. This statement was made in the presence of police officers and his attorneys. (Appendix, pp. 1-60). At trial, a redacted version was read by one of the police officers as part of the state's proof. (Appendix, pp. 61-105). (c). Isaiah Hamilton made an oral statement which the police immediately transcribed. (Appendix, p. 150). Hamilton was later questioned by police and the questions and answers were typed. The transcription was then read to him and he initialed each page and signed the last. (Appendix, p. 152). At trial, only a redacted version of the oral statement was admitted through the testimony of a police officer. (Appendix, p. 160). (d). James Randolph made two oral statements to different police officers. Redacted versions of these statements were admitted through the testimony of the two police officers. (Appendix, pp. 162, 163). (e). Wilbur Lee Pickens was questioned by police and the questions and answers were typed. Pickens initialed each page and signed the last page of the transcription. At trial, a redacted version of the transcription was read into the record by the questioning detective. (Appendix, p. 164).

individuals here, Robert Wood, testified at trial and was subject to cross-examination by the respondent's lawyers.¹⁵ Much of the other evidence existing in the record identifies the individuals as three blacks and a white man. This is the same sort of other evidence which existed in the *Harrington* case. In reaching a finding of harmless error in *Harrington*, this Court stated:

"It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of Cooper's and Bosby's confessions and who otherwise would have remained in doubt and unconvinced. We, of course, do not know the jurors who sat. Our judgment must be based upon our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the mind of the average juror."

See *Harrington*, *supra*, 395 U.S. at 255.

In 1972 this Court decided the case of *Schneble v. Florida*, 405 U.S. 516 (1972). Schneble and his co-defendant Snell were tried jointly in a Florida state court for murder. Neither defendant testified at trial. However, police officers testified to a detailed confession that Schneble had given to them and one officer related a statement given to him by Snell. The statement of Snell, who did not testify, tended to undermine Schneble's initial version and to corroborate certain details of Schneble's confession. There was no redaction performed. This Court affirmed the conviction of Schneble, finding any violation of *Bruton* was harmless error beyond a reasonable doubt in view of the overwhelming evidence of petitioner's guilt as manifested

¹⁵ Although Robert Wood was subject to full cross-examination, two of the respondents, Hamilton and Randolph, chose not to cross-examine and Pickens' counsel asked only one question. See Robert Wood's testimony, (Appendix, pp. 149, 150). This fact is very curious since under any interpretation Robert Wood's testimony is much more inculpatory than the redacted statements here complained of. See *Brookhart v. Janis*, 384 U.S. 1 (1966).

by his confession, which completely comported with the objective evidence, and the comparatively insignificant prejudicial effect of Snell's statement. See *Schneble, supra*, 405 U.S. 429-431. In reaching the conclusion of harmless error this Court stated.

. . . without Schneble's confession and the resulting discovery of the body, the state's case against Schneble was virtually nonexistent. The remaining evidence in the case—the disappearance of Mrs. Collier sometime during the trip, and Snell's statement that Schneble sat in the back seat of the car during the trip and never left Snell alone with Mrs. Collier—could not by itself convict Schneble with this or any other crime.

See *Schneble, supra* at 431.

For the purposes of the case sub judice, there are at least two lessons in *Schneble*. First, each of the respondents' own confessions must be considered as part of the quantum of proof in considering the issue of harmless error.¹⁶ Second, the consistency and corroborative nature of the respondents' confessions must be considered in deciding whether the confession of a non-testifying co-defendant could have significantly affected the jury's verdict. Obviously, the rule of both *Harrington* and *Schneble* is that extrajudicial statements which are corroborative and consistent do little more than the individual's own confession has already done. That is to say, the effect of a non-testifying co-defendant's statement is simply cumulative.

¹⁶ Although recognizing this principle, it is obvious that the Sixth Circuit below had difficulty applying it in this case: "We recognize that the majority opinions in both *Harrington* and *Schneble* accepted the defendant's own confession as part of the evidence to be weighed as admissible in determining whether the violation of the *Bruton* rule was or was not harmless error. Since all three of these confessions were inadmissible at this joint trial, we find this holding conceptually difficult in this case." *Randolph, et al. v. Parker*, 575 F.2d 1178, 1182 (6th Cir. 1978).

In view of *Schneble* and *Harrington*, a closer look is required at the statements actually admitted at trial in this cause.¹⁷ An examination of the statements admitted at trial necessitates the conclusion that they are consistent with each other. In fact, both the magistrate's report (Appendix, p. 291) and the opinion of the Supreme Court of Tennessee (Appendix, p. 239) reflect findings that the statements of Hamilton, Pickens, and Randolph are essentially alike in material details and are corroborative of one another. Furthermore, because of the redaction, these statements have little or no evidentiary value except against the confessor. The conclusion is obvious, the statements are only cumulative in their evidentiary value except for the incriminating effect against the makers.¹⁸ Although the statements, as originally rendered, incriminated the co-defendants, the process of redaction was successful to the extent that this Court may fairly conclude that, as to the non-makers, the "probable impact . . . on the mind of the average juror" was negligible, and at best

¹⁷ As more fully explained in Footnote 14, *supra*, there were a number of statements taken by the police from four of the defendants in this case. However, the trial court supervised a laborious process of redaction and deletion, and the result was that the jury heard much less than the police had. In fact, although Hamilton had given both a short oral statement and had later been questioned in detail by police, at trial only a redacted version of the oral statement was admitted. The testimonial account of Hamilton's statement is approximately one page; that of the two Randolph statements is less than two pages; and the redacted entry of Pickens' statement amounts to approximately five pages. The record is in excess of 1000 pages, the trial consumed approximately two weeks.

¹⁸ As described above, the process of redaction and deletion in this case was laborious and consumes a great portion of the state record. The process was largely successful. In Hamilton's statement, all references to Pickens and Randolph have been changed to "they" references. The only exception is the third sentence where the phrase "two other parties" is used. In Randolph's first statement, again only "they" references are used. In Randolph's second statement, the phrases are "two other parties", "they", and "another party". In Pickens' statement, the phrases are "two others", "we" and "guy" references. In fact, the "guy" reference in Pickens' statement is the only indication of sex in any of the four statements. There is no indication of race, or any other description.

cumulative. In fact, this process of redaction makes this case stronger than *Schneble*, *Harrington*, or *Brown v. United States*, 411 U.S. 223 (1973), wherein this Court also found harmless error.¹⁹

Perhaps the most important distinction between *Bruton* and the cases of *Harrington* and *Schneble* is the fact that in the latter two, the parties raising the *Bruton* objection had confessed themselves. The same is true in the case before this Court. This distinction is particularly important when considering an issue of harmless error. As Mr. Justice White stated in *Bruton*:

"The defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. Though itself an out-of-court statement, it is admitted as reliable evidence because it is an admission of guilt by the defendant and constitutes direct evidence of the facts to which it relates. Even the testimony of an eyewitness may be less reliable than the defendant's own confession. An observer may not correctly perceive, understand, or remember the acts of another, but the admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct."²⁰

¹⁹ In *Schneble*, *Harrington*, and *Brown*, there was no redaction. In *Schneble* and *Brown*, the petitioners were directly named in the co-defendant's statement as admitted at trial. See *Schneble*, *supra*, at 430 and *Brown*, *supra*, 231, footnote 5. In *Harrington*, the petitioner was not named but Bosby's confession referred to Harrington as "a blond headed fellow" or the "white guy" or the "Patty"; and Cooper's confession referred to Harrington as "the white boy" or "this white guy". Of course, as mentioned above, *Harrington*, a caucasian, was being tried with three blacks. The difference is obvious, in neither *Harrington*, *Schneble*, or *Brown*, did the jury have to speculate with regard to the reference. In the case sub judice, any conclusion would be speculation.

²⁰ *Bruton*, *supra*, 391 U.S. 139, 140 (White, J., dissenting).

In deciding *Schneble* and *Harrington*, this Court obviously considered the defendant's own confession against himself and also considered the testimony of the co-defendant who took the stand and was cross-examined. Therefore, these two pieces of evidence automatically become part of the quantum of proof necessary to find harmless error. The only evidence in the record which is struck from the equation is the substantive content of the non-testifying co-defendant's confessions. However, the fact that these confessions are corroborative and consistent should be considered by the reviewing court in determining their probable impact. Applying these principles to the instant case, the proof against each of the respondents includes his own confession, the inculpatory confession²¹ and testimony of Robert Wood, the fact of corroboration and consistency in the excluded confessions, and all other evidence in the record. Using this formula to determine what evidence should be considered, a reviewing court should then determine what was the probable impact of the two confessions, which are to be struck from the equation, on the mind of an average juror. Using this formula,

²¹ As indicated above, Robert Wood gave a detailed statement to police prior to his arrest. See footnote 14. A redacted version of this statement was admitted as part of the state's proof prior to Robert Wood's testimony. The redaction and deletion process was necessary since the state could not anticipate the subsequent testimony of Robert Wood. However, Robert Wood did subsequently testify and was available for cross-examination. Robert Wood's statement was much more detailed than any of those here complained of. Consequently, the redaction and deletion process was arguably less successful. For example, the redacted version of Robert Wood's statement contains some physical descriptions of the respondents (Appendix, pp. 89, 90), and describes their number as three (Appendix, p. 86), leaves no doubt as to their sex (Appendix, p. 84), places weapons on the intruders (Appendix, p. 89), and in some places refers to them as "blank". However, any complaint that the redacted version incriminates the respondents is cured by Wood's subsequent testimony and their opportunity to cross-examine. Therefore, after Wood's subsequent testimony, the jury was constitutionally permitted not only to consider his testimony against the respondents, but to fill in the "blanks" and consider the redacted statement against them also.

which is drawn from the *Schneble* and *Harrington* decisions, the decision of the Court of Appeals is erroneous. The most reasonable conclusion is that any error committed in the admission of the two non-testifying co-defendants' confessions is clearly harmless.

Looking specifically at the admissible evidence, the scenario of this crime is clearly set out in the testimony of Robert Wood, Tommy Thomas, and the redacted statement of Robert Wood.²² At least five other witnesses testified to facts they observed at the time of the crime. These people were not inside the apartment, but their testimony corroborates the testimony of those who were.²³ Further state evidence shows the recovery of the weapons from Hamilton's attic where they were hidden.²⁴ The testimony of Tommy Thomas identifies the respondents as "three Negroes," and this fact is corroborated by the witnesses outside.²⁵ Robert Wood's testimony identifies the three blacks, mentioned in the testimony of at least six other people, as the respondents: Hamilton, Pickens, and Randolph.²⁶ All this evidence constitutes proof which was properly admitted as to all three respondents. To complete the equation, the redacted statement of each respondent must then be separately added to this proof and the result weighed. The results are conclusive: the evidence is overwhelming. The only real issue is identification: Whether Hamilton, Pickens, and Randolph were the three blacks who broke down

²² Appendix, pp. 61-105.

²³ For example, a Ms. Waterbury and a Ms. Rudkins testified to seeing "three colored men" leaving the apartment after the crime was committed. A Mr. Knight testified to seeing "three blacks" at the door of the apartment attempting to break it down. A Mrs. Knight and a Mr. James testified to seeing "a white man and three blacks" at the apartment at the time the robbery was committed.

²⁴ State Record, pg. 818.

²⁵ See footnote 23, *supra*, and Appendix p. 183.

²⁶ State Record, pp. 894, 912, 918, 920 and 921 and Appendix, pp. 117, 136, 142, 144.

the door to complete the murder-robbery. In each case, the respondent's own statement²⁷ basically adds the final touch—direct admission of involvement in the entire scheme, incrimination of self only, and corroboration of the details. If one continues the equation by then adding the co-defendants' statements, nothing is gained. The evidence then becomes cumulative.

The only real factual issue was, and still is, identification. However, the legal issue—the application of the felony-murder rule—seems to overshadow this factual issue. Both the court of appeals and the district court seem bothered by the murder conviction, although finding the state felony-murder rule properly applied.²⁸ In fact, the Court of Appeals states, "there might be reasons to reach a different conclusion as to these defendants if they were contesting a jury verdict of armed robbery rather than first degree murder." *Randolph, et al. v. Parker, supra*, 575 F. 2d at 1182. This conclusion implies that the identification issue is settled in the state's favor. However, this conclusion incorrectly implies that first degree murder here would require anything more than proof of armed robbery and a related homicide, which are amply proven. The result is the misuse of *Bruton* to redécide a question of state law which was correctly decided by the Supreme Court of Tennessee.²⁹

There has existed for some time, considerable split and confusion among the various circuits as to the application of *Bruton*

²⁷ The petitioner is cognizant of the district court's finding that Pickens' confession was admitted in violation of *Miranda*. See Appendix, p. 324. The Court of Appeals' decision affirmed this finding in the last sentence of its opinion. This Court limited the writ of certiorari to the *Bruton* issue. The petitioner hopes that a favorable decision here and remand may cause the Court of Appeals to reconsider. If not, the only effect would be to weaken the identification of Pickens by eliminating his own admissions.

²⁸ See Magistrate's Report on Reference, Appendix, pp. 283-285; and District Court Memorandum, Appendix, p. 322.

²⁹ See Appendix, p. 227.

to facts which are not on point with *Bruton*. Simply stated, if the case sub judice had arisen in another circuit, then the decision quite probably would be different. This split among the circuits is expressly recognized in the Sixth Circuit opinion.³⁰ Judicial attempts in the various circuits and in many states to distinguish cases such as the one sub judice from *Bruton* have resulted in the evolution of several "interlocking confession" concepts which have been impliedly sanctioned by this Court. See *Catanzaro v. Mancusi*, 404 F.2d 296 (1968), *cert. denied*, 397 U.S. 942 (1970); and *People v. Moll*, 256 N.E.2d 185 (N.Y. 1970), *cert. denied* 398 U.S. 911.

There is considerable discussion in the interlocking confession concepts as to whether *Bruton* is inapplicable to such cases, or whether *Bruton* applies but the interlocking nature of the confessions requires a finding of harmless error. See *Ortez v. Fritz*, 476 F.2d 37 (2nd Cir. 1973). The first position contends that *Bruton* simply does not apply to situations where both defendants confess and the confessions interlock because of their corroborative nature.³¹ The second position contends that *Bruton* does apply but the violation is harmless error in light of the two interlocking confessions.³² The practical effect of both positions

³⁰ *Randolph, et al., supra*, p. 1184.

³¹ See *Stewart v. Arkansas*, 519 S.W.2d 733 (1975); *People v. Moll*, 256 N.E.2d 185 (N.Y. 1970) *cert. denied*, 90 S. Ct. 1707 (1970); *United States ex rel. Dukes v. Wallack*, 414 F.2d 246 (2nd Cir. 1969); *United States v. Venere*, 416 F.2d 144 (5th Cir. 1969) (no jury); *McHenry v. United States*, 420 F.2d 927 (10th Cir. 1970); *Bunton v. Commonwealth*, 464 S.W.2d 810 (Ky. 1971); *Oneil v. State*, 455 S.W.2d 597 (Tenn. 1970); and *State v. Hall*, 178 N.W.2d 268 (Neb. 1970).

³² See *People v. Rosochacki*, 244 N.E.2d 136 (Ill. 1969); *Jones v. Florida*, 227 So.2d 326 (Fla. App. 1969); *Connecticut v. Oliver*, 273 Atl.2d 867 (1970); *People v. Rayes*, 266 N.E.2d 539 (Ill. App. 1970); *State v. Anderson*, 229 So.2d 329 (1969), *rev'd on other grounds*, 403 U.S. 949; *State v. Brinson*, 177 S.E.2d 393 (N.C. 1970).

is the same. Further, and more important, the application of these cases would result in a different decision than reached in this case by the Sixth Circuit. The Sixth Circuit's decision in this case conflicts with the decisions reached in at least six other circuits. Although the results reached the Second, Third, Fifth, Seventh, Eighth, and Tenth circuits differ somewhat in reaching their conclusion, the basic conclusion is consistent and clear—confessing co-defendants whose confessions are consistent and corroborative do not stand in the same shoes as Mr. *Bruton*.

In *Catanzaro v. Mancusi*, 404 F.2d 296 (2nd Cir. 1968) three individuals were tried and convicted of murder in New York state court. The confession of *Catanzaro* and his non-testifying co-defendant, *McChesney*, were admitted at the joint trial. *Catanzaro* sought a writ of habeas corpus and relied upon *Bruton*. The Second Circuit denied the writ and affirmed the conviction, stating:

The reasoning of *Hill* and *Bruton* is not persuasive here. Both of those cases involved a defendant who did not confess and who was tried along with a co-defendant who did. In our case *Catanzaro* himself confessed and his confession interlocks and supports the confession of *McChesney*.

Where the jury has heard not only a co-defendant's confession, but the defendant's own confession, no such devastating risk attends the lack of a confrontation as what was thought to be involved in *Bruton*."

See *Catanzaro, supra*, at p. 300.

Simply stated, the Second Circuit in *Catanzaro* refused to apply the sanctions of *Bruton* because of the distinctions between that case and *Bruton*. The major distinctions were confessions by both defendants, instead of only one, and the interlocking nature of the confessions. See also *United States ex rel. Duff v. Zelker*, 452 F.2d 1009 (2nd Cir. 1971).

In *Metropolis v. Turner*, 437 F.2d 207 (10th Cir. 1971) two state co-defendants had been tried and convicted of murder. Both had made complete confessions which were admitted at trial with instructions that such were admissible only against the declarant. In a habeas corpus proceeding the district court granted the petitions under the authority of *Bruton*. The Tenth Circuit reversed the district court and stated: "We need not concern ourselves with the legal nicety as to whether the instant case is without the *Bruton* rule, or is within *Bruton* and the violation thereof constituting only harmless error. In either event the judgment of the trial court (district court) must be reversed". In reversing the district court, the Tenth Circuit discussed and was persuaded by the rationale of both *Harrington* and *Catanzaro*.

In *United States v. Spinks*, 470 F.2d 64 (7th Cir. 1972), cert. denied, 409 U.S. 1011 (1972), Spinks and one Turner were tried together and convicted of robbery in federal court. Spinks and Turner had both given confessions with no substantial factual differences. The other three individuals involved in the robbery did not confess and apparently their trials were severed for this reason. Turner's confession implicated Spinks, and Turner did not testify. In affirming the conviction the Seventh Circuit cited *Catanzaro*, *Schneble*, and *Harrington*, and further stated:

There is no merit in Spinks' claim that he was prejudiced by denial of the right to cross-examine Turner. It would be ludicrous to have Spinks trying to break down Turner's confession, which implicated Spinks, while Spinks' own confession remained unchallenged, and even if Turner's confession had been excluded from the evidence—or even if Spinks' motion for severance had been granted—Spinks would still be faced with his own confession.

See *Spinks*, supra, at 66; see also *United States, ex rel. Long v. Pate*, 418 F.2d 1028 (7th Cir. 1969).

In *United States v. Walton*, 538 F.2d 1348 (8th Cir. 1976), the two defendants had been convicted in District Court of armed robbery. Both defendants confessed, and both confessions, implicating the other defendant, were admitted at trial. There was no redaction in the confessions and neither defendant testified at trial. The Eighth Circuit affirmed the conviction and the opinion does much to elucidate the law relating to interlocking confessions, *Bruton*, and *Harrington*. The Eighth Circuit stated: "It is now well established that *Bruton* does not automatically call for a reversal where interlocking confessions of a co-defendant tried at the same time are admitted in evidence, and that there should be no reversal where the appellate court is convinced that a complaining defendant was not subjected to a substantial risk of incurable prejudice as a result of the admission of his co-defendant's confession." See *Walton*, 538 F.2d at 1353. In reaching this conclusion in *Walton* the Eighth Circuit, like the Tenth Circuit in *Metropolis* found that from a practical standpoint it made no difference whether the Court held the admission of the confessions was not erroneous or whether they found the error harmless beyond a reasonable doubt. The Eighth Circuit also cited both *Harrington* and *Catanzaro* in supporting their decision. See also *Hall v. Wolff*, 539 F.2d 1146 (8th Cir. 1976).

In *Mack v. Maggio*, 538 F.2d 1229 (5th Cir. 1976), three co-defendants had confessed to the same crime. The confessions interlocked with only slight variances, and they were admitted with none of the confessors testifying. Two of the state prisoners sought federal habeas corpus relief which was refused by the district court. The Fifth Circuit affirmed and found that *Bruton* was inapplicable to such situations.

In *United States v. Digilio*, 538 F.2d 972 (3rd Cir. 1976) three men, Digilio, Lupo, and Szwandrak were convicted in the United States District Court for conspiracy. Statements taken by the F.B.I. from Lupo and Szwandrak were admitted at the

joint trial. These statements were redacted when read to the jury and neither Lupo or Szwandrak testified. All references to Digilio were deleted. The Third Circuit expressly disapproved of the suggestion that there is "a parallel statement" exception to the *Bruton* rule. Nevertheless, the Third Circuit affirmed the conviction on the basis of harmless error and in doing so mentioned a corroborative effect of the consistent confessions.

The petitioner submits that a close reading of the cases, both federal and state, construing *Bruton* demonstrates there is no interlocking confession doctrine, nor is there a simplistic parallel statements rule operating as an exception to *Bruton*. Although many cases turn on the question of whether *Bruton* applies, most recognize the answer requires the consideration of a number of factors of which interlocking and parallel characteristics may be one. This rationale is proper since the paramount issue is not, and never was, whether or not *Bruton* is violated, but whether the defendant's Sixth Amendment right to confrontation has been impugned. *Bruton* may assist in this resolution but certainly is no more important than the facts, and other relevant cases construing the Confrontation Clause.³³ Thus, a reviewing court should consider whether the devastating effect, addressed in *Bruton*, has been eliminated by a successful redaction and deletion process. Accordingly, a reviewing court should inquire whether the admission of the defendant's own confession has eliminated the risk of prejudice which may have resulted

³³ The distinctions between this case and *Bruton* are as real as the distinctions recognized in *Frazier v. Cupp*, 394 U.S. 731 (1969) and *Dutton v. Evans*, 400 U.S. 74 (1970). In *Frazier* the prosecutor, in good faith, told the jury in opening argument the substance of a co-defendant's statement which incriminated Frazier. The co-defendant did not testify. This Court affirmed the conviction and relied in part on the curative instructions of the trial judge. In *Dutton*, a Georgia evidentiary statute was the basis for allowing inculpatory hearsay. This Court affirmed, finding a lack of devastating impact. Both cases involved more direct incrimination than this one.

from the admission of his co-defendant's confession. The consistency and corroborative nature of the confessions should be considered in attempting to determine whether they are cumulative in their impact on the mind of an average juror. Other factors, such as the other evidence in the record and any cautionary instructions given by the trial judge, should be considered in attempting to determine whether the right to confrontation has been impermissibly violated. When these considerations are made here, only one of two conclusions can be reached: Either, (1) the Sixth Amendment has not been violated; or (2) any violation is harmless beyond a reasonable doubt. The Confrontation Clause has never meant an absolute right to cross-examination, nor has the Clause ever been an absolute bar against hearsay. The Sixth Amendment has been satisfied in this case, when the entire record is considered and an overly technical application of *Bruton* is avoided. On more than one occasion, this Court has stated that a defendant is entitled to a fair trial but not a perfect one. *E.g.*, *Lutwak v. United States*, 336 U.S. 440 (1949).

CONCLUSION

About a half a century ago Mr. Justice Cardozo writing in the Sixth Amendment case of *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) stated, "There is danger that the criminal law will be brought into contempt—that discredit will even touch the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free". Here too, the record establishes the guilt of the respondents without question and the possibility of prejudice from the issue before this Court is gossamer. For these considerations, and for the others mentioned above, the State of Tennessee respectfully prays that this Court will reverse the

Court of Appeals for the Sixth Circuit and remand this case to the Sixth Circuit for further consideration.

Respectfully submitted,

WILLIAM M. LEECH, JR.
Attorney General

ROBERT E. KENDRICK
Deputy Attorney General

MICHAEL E. TERRY
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37219
Phone (615) 741-2640